No. 274.

Brf. of Evans & Low for Pl.

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JAMES H. McKENNEY,
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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

Filed April 15, 1901.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*

v.

BERTHA ZERNECKE, ADMINISTRATRIX OF THE ESTATE OF ERNEST H. ZERNECKE, DECEASED, *Defendant in Error.*

No. 274.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

This action was brought in the court below by the defendant in error to recover from the plaintiff in error damages that resulted from the death of Ernest H. Zernecke, deceased, who was killed upon the railway of the plaintiff in error in Lancaster County, State of Nebraska, by the criminal act of one George Washington Davis, on the 9th day of August, 1894. Davis killed the deceased and ten other persons, one of whom was Wm. O. Ham-

bel, by tearing up the track of the plaintiff in error, and derailing one of its passenger trains, upon which the deceased and the other ten persons, who were killed, were being transported by the plaintiff in error as passengers.

Davis was thereafter indicted, tried, and convicted of murder in the first degree for the killing of said Wm. O. Hambel at the time and in the manner above stated. His case was appealed to the Supreme Court of that State, where the judgment of the trial court was affirmed, and he is now confined in the penitentiary of said State, serving a life sentence as his punishment for said crime.[1]

In stating her cause of action against the railway company the plaintiff in her petition avers:

"1st. The plaintiff complains of the defendant and alleges that on the 10th day of November, 1894, this plaintiff was duly appointed and qualified as administratrix, and letters of administration were duly issued and granted to her, of the estate of Ernest Zernecke, deceased, by the probate court of Lancaster County, Nebraska, and the plaintiff sues as such administratrix.

"2d. That the defendant is and at the times hereinafter mentioned was, a corporation duly incorporated under the laws of the State of Nebraska, and owned and operated a railroad therein known as the Chicago, Rock Island and Pacific Railway, and was and is a common carrier of passengers for hire between the places hereinafter mentioned, and between the stations of Martel, Nebraska, and Lincoln, Nebraska, all of which railroad between said stations is in the State of Nebraska.

"3d. On or about the 9th day of August, 1894, the said defendant, in consideration of the sum of 41 cents, received the said Ernest H. Zernecke, then living, as a passenger on said railroad from Martel, Nebraska, to said

[1] Davis v. State, 51 Neb. 301.

Lincoln, Nebraska, and while said Ernest H. Zernecke was on the cars, on said journey, as a regular passenger, at a distance of about five miles south of Lincoln, Nebraska, and in this State, the car in which said Ernest H. Zernecke was riding was by the negligence of the defendant and its servants derailed, thrown from and ran off the track, and said Ernest H. Zernecke was, without fault or negligence on his part, thereby killed.

"4th. Plaintiff further alleges that said Ernest H. Zernecke left the plaintiff, Bertha Zernecke, his widow, him surviving; Zilda Zernecke, his daughter, aged eight years; Marie Zernecke, his daughter, aged six years; and Carl F. Zernecke, his son, aged one year, his only children and next of kin, who were dependent upon him for support, and said children were dependent upon him for maintenance and education also.

"Plaintiff further avers that said Ernest H. Zernecke was at the time of his death about 40 years of age and in good health, able to perform manual labor and to conduct general real estate and abstracting business, in which he was then engaged; that he was able to earn and did earn thereby the sum of $2,000 per year, and that the earnings from his said business were applied to the support and maintenance of his said family, the plaintiff and their said minor children, and that his said labor and business were the only means of support, education and maintenance possessed by said family, and said widow and minor children of said Ernest H. Zernecke have sustained permanent damage by reason of the aforesaid wrongful act, neglect and default of said defendant in the sum of five thousand dollars.

"Wherefore plaintiff prays, as such administratrix, for judgment against the defendant for the amount of five thousand dollars and costs of suit."[1]

The plaintiff in error answered as follows:

"1st. Comes now, said defendant, and for answer to plaintiff's petition in the above entitled cause denies all and singular the allegations thereof, except such as are hereinafter expressly admitted.

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[1]Record, 8, 9.

"2d. Further answering, the defendant admits and avers:

"1st. That it is and at all times mentioned in said petition was a corporation organized and existing under and by virtue of the laws of the States of Illinois and Iowa, and a domestic corporation of the State of Nebraska.

"2d. That at all times mentioned in said petition it was the owner of and was operating a railroad in the State of Nebraska, and was and is a carrier of passengers for hire between the stations of Martel, Nebraska, and Lincoln, Nebraska, on said railway. But the defendant denies that the said Ernest H. Zernecke, deceased, mentioned in said petition, was injured in any way by reason of the carelessness or negligence of this defendant, or any of its servants, agents or employes, and denies that the said Ernest H. Zernecke was killed by reason of any carelessness or negligence on the part of the defendant, or any of its servants, agents or employes.

"3d. Further answering, the defendant avers that on or about the 9th day of August, 1894, near Lincoln, in the County of Lancaster, State of Nebraska, and at the time in said petition stated, the train and car mentioned in said petition, while being run and operated with all possible care and caution, were, by some person or persons not in the employ or under the control of the defendant and without its knowledge wilfully, maliciously and feloniously derailed and thrown from the track on which they and each of them were at said time being run and operated, resulting in great loss to the defendant, its servants, agents and employes; that said person or persons who derailed and threw said train and car from the track as aforesaid, wilfully, maliciously and feloniously removed and displaced from the track aforesaid at the point of said derailment certain spikes, nuts, angle-bars, fish-plates, bolts and rails, and otherwise tore up and destroyed said track of defendant at the point aforesaid, and caused said car and train to be derailed and thrown from the track, as aforesaid, without any carelessness or negligence on the part of the defendant, or any of its agents, servants or employes;

that said car and train at the time of being derailed and thrown from the track, as aforesaid, and at all other times, was operated and run in a skillful and proper manner and with great care and caution; that the said railroad and track at the point aforesaid and at all other points was kept and maintained in good and safe condition and repair, and that the defendant did not know, and had no means of knowing, at the time of said derailment or prior thereto, of the removal or displacement from said track of said nuts, bolts, angle-bars, fish-plates and rails or either of them, and did not know and had no means of knowing that said track at said point had been torn up or destroyed, and that the defendant could not by the exercise of the utmost care, caution, prudence and foresight have prevented said derailment and wrecking of said train and car.

"The defendant avers that as to whether said Ernest H. Zernecke, mentioned in said petition, was on said train or car at the time of said derailment it has not knowledge or information thereof sufficient to form a belief, and that as to whether the said plaintiff was on the 10th day of November, 1894, or at any other time, duly appointed and qualified as administratrix of the estate of said Ernest H. Zernecke, deceased, the defendant has not knowledge or information thereof sufficient to form a belief.

"And, having fully answered, the defendant asks to be discharged hence with its costs in this behalf laid out and expended."[1]

The statute upon which this action is founded, and which is the only statute of Nebraska giving or creating a right of action for the death of a person, is as follows:

"An Act authorizing the recovery of damages by the personal representatives of a person whose death is caused by the wrongful act of a person, company or corporation:

"SECTION 1. That wherever the death of a person shall

[1] Record, 9, 10.

be caused by the wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, in respect thereof, then, and in every such case, the person who, or the company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."[1]

This act is the same as the act known as "Lord Campbell's act," passed in 1846.

It will be observed both from the body and title of this act that a cause of action is not created unless the death "shall be caused by the wrongful act, neglect, or default" of the person sought to be charged.

Upon the trial the defendant in error introduced evidence tending to prove that at the time the deceased was killed he was being transported over the railway of the plaintiff in error; and that the train upon which he was traveling was derailed and thrown from the track, resulting in his death and the death of ten other persons. The railway company then called many witnesses and offered to prove by them the way and manner in which the railway and train were constructed, operated and maintained at all times in question; that it was not guilty of any negligence or carelessness in the construction, operation or maintenance of them or either of them; that the death of the deceased was not "caused by the

[1] Comp. Laws of Neb., 1899, p. 491.

wrongful act, neglect or default" of the plaintiff in error; that it could not by the exercise of the greatest care, caution, prudence and foresight have prevented the derailment of said train or the death of said deceased; and that the deceased was killed by Davis in the manner above stated.

Notwithstanding the statute upon which the action is based, and upon which it must be maintained, if at all, provides that before a recovery can be had the death "shall be caused by the wrongful act, neglect or default" of the party sought to be charged, the court denied the offer and excluded the evidence. The court also, upon the motion of the defendant in error, suppressed the depositions of several witnesses for the plaintiff in error, which showed clearly and without conflict that the death of the deceased was not caused by the "wrongful act, neglect, or default" of the plaintiff in error.

At the close of the evidence the court, on motion of the defendant in error, instructed the jury as follows:

"1. The jury are instructed that if you find from the evidence that Ernest H. Zernecke was a passenger, being carried on the train of the defendant railway company that was derailed and wrecked near Lincoln, Nebraska, on August 9, 1894, thereby causing the death of said Zernecke, and that plaintiff is administratrix, and she and her children had a pecuniary interest in his life and suffered loss by his death, then you should find for the plaintiff."[1]

[1] Record, 17.

And refused to give to the jury the following instruction requested by the railway company:

"The court instructs the jury that if the defendant, in the operation and maintenance of its railroad and trains, used and observed all possible care, caution and foresight to prevent accident and to care for its passengers that was practicable in its operation of said road and trains, then the defendant would not be liable in this case, and your verdict should be for the defendant." [1]

The jury returned a verdict in favor of the plaintiff below for $4,500, upon which judgment was rendered against the railway company. The plaintiff in error, by proper proceedings, took the case to the Supreme Court of the State, where the judgment of the trial court was affirmed,[2] and it then brought the case to this court.

The Supreme Court, in deciding and rendering judgment against the plaintiff in error, held and adjudged that the following statute of that State, passed in 1867, created a *conclusive presumption of negligence* against the plaintiff in error:

"Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." [3]

The district court and the Supreme Court of the State held that it *was finally and conclusively determined* by

[1] Record, 15.
[2] Record, 174, 177.
[3] Comp. Laws of Neb. 1899, p. 838.

the statute just quoted that the death of the deceased was "caused by the wrongful act, neglect or default" of the plaintiff in error and that evidence on the part of the plaintiff in error respecting the manner in which the deceased was killed was incompetent and could not be considered in any way, unless it showed that the deceased was killed by his *own criminal negligence.*

The Supreme Court, in referring to this statute said:

"It gives or creates a right of action in favor of the injured passenger, and when it is established that a person is injured while a passenger of the railroad company *a conclusive presumption of negligence* arises in every case, except where it is disclosed that the injury was one caused by his own criminal negligence or by his violation of some rule of the company brought to his actual notice. . . . In other words, *a conclusive presumption of negligence* arises when the case does not fall within the exceptions of the law and he has his right of action. . . . Now it is indisputable that if Zernecke had been injured merely, and not killed, he would have recovered against the railway company under said section 3, article 1, of chapter 72, and that thereunder said injuries would have been deemed to have been caused by the wrongful acts, neglect or default of the said railway company in failing to carry such passenger safely. Hence this case falls within the scope of said chapter 21 and the *fact of negligence*, or defendant's *wrongful acts or default is established* when the evidence discloses the facts specified in said section 3 of chapter 72."[1]

The plaintiff in error contended in the trial court, as well as in the Supreme Court, that this statute, that is, the one *creating a conclusive presumption of negligence* was

[1] Record, 175, 176.

and is in contravention of the Fourteenth Amendment to the Federal Constitution, and that it deprives the railway company of its property "without due process of law" and denies to it "the equal protection of the laws." This contention was denied by the Supreme Court and by the trial court.

SPECIFICATIONS OF ERROR.

Said plaintiff in error says that in the record and proceedings of said Supreme Court of the State of Nebraska, in said cause, there is manifest error in this:

1. That said court erred in affirming the judgment of the district court of Nebraska in said cause.

2. That said court erred in rendering judgment against the plaintiff in error and in favor of defendant in error.

3. That said court violated the Fourteenth Amendment to the Federal Constitution and deprived the plaintiff in error of its property without due process of law, and denied to it the equal protection of the laws.

4. That said court erred in holding and deciding that the following statute of the State of Nebraska was not unconstitutional:

"SEC. 3. Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury

complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice."

6. That said court erred in holding and deciding that the statute set out in specification of error number four hereof was not in contravention of the Federal Constitution.

7. That said court erred in not reversing said judgment of said district court of the State of Nebraska.

8. That said court erred in holding and deciding that the statute set out in specification of error number four hereof was not in contravention of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

"Sec. 3. Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice."[1]

This statute, as construed by the Supreme Court of the State, which construction is conclusive upon this court and cannot be "re-examined here as to its propriety or accuracy," is in contravention of the Fourteenth Amendment to the Federal Constitution in this, that when enforced it deprives the plaintiff in error of its property "without

[1] Comp. Laws of Neb. 1899, p. 838.

due process of law" and denies to it "the equal protection of the laws."[1]

1. The statute known as "Lord Campbell's act" is the only statute in Nebraska which creates or gives a right of action for the death of a person, and it, as well as all other statutes of that character, expressly provides that an action can be maintained only where the death shall be caused by the "wrongful act, neglect, or default" of the person sought to be charged. In other words, no right of action is given when the death is not caused by wrongful act, neglect, or default. The right of recovery and the liability in all cases must be measured and determined by this statute, and the liability is not imposed or created except on the conditions therein stated. The right of the plaintiff in error to be heard and present evidence on the determination of this question of fact is reserved by the statute upon which the action is based and protected by the Fourteenth Amendment to the Federal Constitution. But the law-making power of the State attempts by this statute of 1867 to create a *conclusive* presumption of negligence against the railway company; to adjudge and to determine conclusively, without a hearing and without a trial, that the plaintiff in error was guilty of a wrongful act, neglect, or default,

[1] Ry. Co. v. Minn., 134 U. S. 418, 456.
Ry. Co. v. Ill., 163 U. S. 142, 152.
Ry. Co. v. Neb., 164 U. S. 403, 414.

and that it resulted in the death of the deceased, and to deny a trial and a hearing in the determination of this question. The right of defense—the right of a trial, and the right to controvert by proof every material fact which bears on or involves the question of liability—is just as valuable and is protected to the same extent as the right of action or the right to sue. They are relative rights and are of the same value and importance and protected to the same extent by the Federal Constitution.

This right has been well stated by this court, as follows:

"Wherever one is assailed in his person or his property there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations."[1]

Again:

"The liability and the right are inseparable. A different result would be a blot on our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and the right administration of justice."[2]

The lawmaking power cannot determine by an act that the plaintiff in error has been negligent or careless, or that a *conclusive* presumption of negligence or carelessness arises against the carrier from proof that a passenger was injured, regardless of the manner in which the injury was sustained.

[1] Windsor v. McVeigh, 93 U. S. 274, 277.

[2] McVeigh v. U. S., 11 Wall. 259, 267.

Mr. Webster, in speaking of the powers of the Legislature and their separation from the judicial functions of the government, said:

"It (the Legislature) shall not adjudge by act; it shall not decide by act; it shall not deprive by act, but it shall leave all things to be tried and adopted by the law of the land."

Referring to "due process of law," Mr. Cooley says:

"Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. . . Everything which may pass under the form of an enactment is not therefore to be considered the law of the land.'

"The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they 'proceed upon inquiry' and 'render judgment only after trial.' It is entirely correct, also, in assuming that a legislative enactment is not necessarily the law of the land. The words 'by the law of the land,' as used in the Constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense."[1]

"The idea," say sMr. Justice HARLAN, in speaking for this court, "that any legislature, state or federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law is in opposition to the theory of our institutions. The duty rests upon all courts, federal and state, when their jurisdiction is properly invoked to see to it that no right secured by the supreme law of the land is impaired or destroyed by a legislature. This function and duty of

[1]Cooley's Const. Lim. 6th ed. 431.

the judiciary distinguishes the American system from all other systems of government."[1]

The Legislature by the act in question determines without a trial, without a hearing, without notice, and without inquiry, that the railway company has been guilty of negligence—that certain facts shall be *conclusive evidence of negligence* against the plaintiff in error. It is thereby deprived of any inquiry on this question and of the right of introducing evidence showing that it was not guilty of the negligence charged, and without which it was not liable.

The following language is especially applicable here:

"Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.

"We have held that it is within the power of legislation to declare that certain proofs shall be *prima facie* evidence of specified facts. But at the same time we decided that the legislature could not constitutionally ordain that such proofs should be conclusive evidence of material facts in controversy. The first is a mere rule of evidence. The last has been characterized as 'a confiscation of property.'"[2]

It is well settled that the legislature may lawfully provide what shall be received as evidence, but it cannot

[1] Smyth v. Ames, 169 U. S. 466, 527.

[2] Zeigler v. South & North Ala. R. Co., 58 Ala. 594, 599.

make that *conclusive* which may be shown to be false; it cannot manufacture falsehood into truth, or give to falsehood or untruth the conclusive validity of truth.

In discussing this question, Mr. Cooley says:

"But there are fixed bounds to the power of the legislature over this subject which cannot be exceeded. As to what shall be evidence, and which party shall assume the burden of proof in civil cases, its authority is practically unrestricted, so long as its regulations are impartial and uniform; but it has no power to establish rules which, under pretense of regulating the presentation of evidence, go so far as to altogether preclude a party from exhibiting his rights. Except in those cases which fall within the familiar doctrine of estoppel at the common law, or other cases resting upon like reasons, it would not, we apprehend, be in the power of the Legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations the law of the land requires an opportunity for a trial; and there can be no trial if only one party is suffered to produce his proofs."[1]

On this question the Supreme Court of Arkansas says:

"It is not within the province of the Legislature to divest rights by prescribing to the courts what should be conclusive evidence. This matter was fully considered in *Fulton Railroad Company v. Parks*, 32 Ark. 131, which arose under a statute which endeavored to make a county clerk's deed of lands, sold for taxes, *conclusive* of its recitals against the true owner. Justice Walker, in delivering the opinion, remarked: 'The Legislature may declare what shall be received as evidence, but it cannot make that conclusively true which may be shown to be false;' * * * Railroad companies have the right to run their trains, and the consequent right of being protected in doing so, unless damage to others should result from some negligence, want of due care

[1] Cooley's Const. Lim., 6th ed. p. 452.

or culpable neglect of reasonable precautions imposed by the legislative power. It affects their substantial rights of property to be able to show the facts, and they cannot be constitutionally deprived of the power."[1]

The same court, in the case of *Cairo & Fulton R. Co. v. Parks*, said:

"To make proof of certain facts by one party 'conclusive evidence of their truth,' and to deny to the party who desires the truth of them, the privilege of proving them to be false, is, in effect, manufacturing falsehood into truth, or giving to falsehood the validity and effect of truth. If the Legislature has power to do this, then, that provision in the bill of rights, which ordains that, 'no one shall be deprived of life, liberty, or property, but by the judgment of his peers, or the law of the land,' is a dead letter, because to deprive the citizen of the right to protect his property by showing that it has been taken from him contrary to law, is, in effect, denying to him the protection of the law."[2]

The Legislature may declare what shall be received as evidence, but it cannot make that conclusively true which may be shown to be false.

In the case of *Wantlan v. White*,[3] the Supreme Court of Indiana said:

"It is not competent for the legislative power to declare what shall be conclusive evidence of a fact."

Again:

"Statutes which undertake to make proof of certain facts absolute or conclusive of guilt are unconstitutional. Those which merely declare statutory presumptions affecting the burden of proof are valid."[4]

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[1] L. R. & F. S. R. Co. v. Payne, 33 Ark. 816, 819.
[2] 32 Ark. 132, 145.
[3] 19 Ind. 472.
[4] Voght v. The State, 124 Ind. 358, 362.

The same principle is stated by the Supreme Court of Minnesota in the case of *Vega Steamship Company v. Consolidated Elevator Company.*[1] In that case the question involved was whether the Legislature had power to make the certificate of the public weighmaster conclusive evidence. In stating the rule for which we contend, the court said:

"But is it competent for the Legislature to make the weight thus ascertained absolutely conclusive? We are of the opinion that it is not. The Legislature cannot in this manner provide for the arbitrary exercise of power, so as to deprive a person of his day in court to vindicate his rights. And the law which closes his mouth absolutely when he comes into court is the same, in effect, as the law which deprives him of his day in court. See Cooley Const. Lim. (6th ed.) 452; 6 Am. & Eng. Ency. Law (2d ed.) 1050; *Graves v. Northern*, 5 Mont. 556, 6 Pac. 16; *Johns v. State*, 55 Md. 362, 363; *Wantlan v. White*, 19 Ind. 470."

A case directly in point is that of *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*,[2] decided by this court. In that case was involved the validity of a statute of Minnesota by which rates made and adopted by a railroad and warehouse commission were made "*not simply advisory, nor prima facie equal and reasonable, but final and conclusive.*"

This court, in holding that statute in contravention of the Federal Constitution, and, therefore, unconstitutional, used the following language:

[1] 75 Minn. 308, 312.

[2] 134 U. S. 418, 457.

"We are of opinion that . . . it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the State court, cannot be regarded as clothed with judicial functions, or possessing the machinery of a court of justice."

Let us assume for the purpose of the argument that the Legislature could declare that proof of the possession of property shall be conclusive evidence of its ownership. Would any person contend that the act would be valid? Certainly not. Or let us assume, as the Supreme Court of Iowa says, that if "the Legislature should declare that an indictment duly found by the grand jury should be conclusive evidence of guilt against the accused, would this deprive him of his liberty without due process of law? If so, where is the line at which the legislative power begins and where does it end?"

No lawyer would contend that life or liberty could be taken by a statute similar in principle to the one in question, or that a statute reading as follows would be "due process of law" or constitutional:

"Whenever a person who is being transported on a railroad train as a passenger shall be killed, the conductor or other person in charge of the train at such time shall be guilty of murder."

Nor is it within the power of the Legislature to declare that on the trial of a person charged with murder, proof of certain facts shall be conclusive evidence of the guilt of the accused. This is elementary. Yet, life, liberty and property are placed on an equal footing by the constitution—are placed in the same category. They are grouped together in the same sentence, and each, as opposed to the unlawful deprivation thereof, is of equal constitutional importance.[1]

If the Legislature may lawfully declare that proof of any injury to a passenger shall be conclusive evidence of negligence or carelessness on the part of the carrier, it may also lawfully declare that the same proof of injury, or, in the legislative caprice, proof of any other fact, shall be conclusive evidence that the injured person was in fact a passenger of the carrier. In this direction it might go so far as to declare that proof of any injury to any person, for example, a person not in or upon any train of the carrier, but upon its track or a highway crossing, or upon its station grounds at the time of the injury, shall be conclusive evidence that the person so injured was in fact a passenger of the carrier. In this manner every question of fact involved in a case could be conclusively determined by the Legislature before trial and without a hearing of any kind.

[1] Wynehamer v. People, 13 N. Y. 378. | State v. Julow, 129 Mo. 163.

But a hearing and a trial under such circumstances, when the questions of fact upon which is based the right of recovery and liability are finally and conclusively fixed and determined against one party and in favor of the other, is not such a trial or hearing as is meant by "due process of law," or that which is guaranteed by the Federal Constitution.[1] The statute which closes a party's mouth "absolutely when in court is the same in effect as the law which deprives him of his day in court."[2]

"Due process of law not only requires that a party shall be properly brought into court, but that he shall have the opportunity when in court to establish any fact which, according to the uses of the common law or the provisions of the Constitution, would be a protection to himself or property."[3]

If it is within the power of the Legislature to say that proof of an injury to a passenger shall be conclusive evidence of negligence against the carrier, it can as well say that the same proof shall be conclusive evidence of negligence on the part of the passenger.

2. Railroad companies are by this statute made liable to a passenger for damages caused by the passenger's own carelessness or want of care.

"Every railroad company," the statute says, shall be liable for all damages sustained by a person while being transported over its road, as a passenger, except in the following cases:

[1]R. Co. v. Chicago, 166 U. S. 226.
[2]Vega Steamship Co. v. Consolidated Elevator Co., 75 Minn. 308; R. Co. v. Minnesota, 134 U. S. 418.
[3]Wright v. Cradlebaugh, 3 Nev. 341, 349.

(1) Where the injury done arises from the "*criminal* negligence" of the person injured; or,

(2) Where the injury complained of shall be the violation of an express rule or regulation of said road actually brought to his or her notice.

This, we submit, gives a right of action against the railway company to a passenger for damages which may have resulted entirely from his own carelessness. And this is true even though the railway company exercised all possible care and caution, and did not in any way contribute to the injury or death. It matters not that the railway company does everything possible to protect and care for the passenger, yet if he loses sight of his own safety and is injured solely by his own negligent and careless act, he can recover under this statute all damages resulting therefrom, if he was not "*criminally*" negligent.

In other words, the railroad company is compelled to compensate him for his failure to exercise ordinary care and prudence for his own safety. He is not only relieved from the duty which rests upon all passengers at all times and under all circumstances to exercise ordinary care and prudence for their own safety, but this statute places a premium upon his failure to observe such care. In effect it says: "You may lay aside all ordinary care and caution; you may violate every rule and regulation of the railroad company that is not ac-

tually brought to your notice; you may be reckless, careless and foolhardy and injure yourself and recover all resulting damages from the railroad company, if you are not *criminally* negligent." The law-making power has no right to compel A to respond in damages to B for B's own carelessness. The statutes of every other State in the Union and of Congress may be searched in vain for a law permitting or authorizing such an outrage or encouraging such a wrong. It is contrary to our form of government, to the Constitution of the United States, and to every principle of right and justice upon which all constitutions are founded, and to which all laws, rules and regulations must conform.

This is not a question of contributory negligence. The statute says the carrier is liable even though the accident was caused entirely by the passenger's negligence.

In the old case of Dr. Bonham, 8 Coke, 118*a*, Lord COKE said:

"It appears in our books that in many cases the common law will control acts of Parliament, and adjudge them to be utterly void; for, when an act of Parliament is against *common right and reason*, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void."

The Supreme Court of Wisconsin says:

"No person, by his own transgression, can create a cause of action in his own favor against another for not interfering. That to which a man consents, or causes by his own action, cannot be considered an injury for

which he can recover damages. . . . *Volenti non fit injuria.*"[1]

Mr. FIELD, in his work on Damages, states the rule as follows:

"'It is the duty of a person to use *ordinary and reasonable care* and means to prevent an injury and the consequences of it. And he can only recover damages for such losses as could not, by such care and means, be avoided.' . . . It is the plaintiff's own fault if he fails to use reasonable efforts, care and diligence to protect himself from injury or loss, and where he fails so to do, he will not be permitted to say that the loss that might have been thus avoided, was caused by the wrong of the defendant; *for it is against the policy of the law as well as common principles of justice to permit a party to reap any advantage from his own negligence or from his own wrong.* . . . In such cases the maxim, *nullus commodum capere probit de injuria sua propria*, applies, and the rule is applicable in cases of contracts as well as in torts."[2]

No person can take advantage of his own wrong.[3]

If a person by his own negligent or wrongful act prevents a thing being done, he cannot recover damages therefor.[4]

REED, J., in speaking for the Court of Appeals of Colorado, in *R. Co. v. Outcalt*,[5] said:

"However it may be in England, it is clear that the contitutions of this and other States confer no power upon the legislature to enact laws in conflict with the principles of *natural justice and equity* of the common law upon which those constitutions were founded, and

[1] Richards v. City of Waupun, 59 Wis. 45, 47; United States v. Wormer, 13 Wall. 25, 29.

[2] Field on Law of Damages, sec. 126; Weeks, Damnum Absque Injuria, sec. 121; Wharton's Legal Maxims, p. 139.

[3] Broom's Legal Maxims, 256.

[4] U. S. v. Peck, 102 U. S. 64, 65.

[5] 31 Pac. 177, 179.

which for centuries have been regarded as fundamental. The general grant of power to make 'reasonable and wholesome laws' is limited; it confers no power to enact a law in violation of the fundamental principles of the common law, as they existed at the time the constitutions were adopted."

In *Calder and wife v. Bull*, Judge CHASE said:

"I cannot subscribe to the omnipotence of a State Legislature or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or fundamental law of the State. . . . The nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments, that no man shall be compelled to do what the laws do not require, nor to refrain from acts which the law permits. There are acts which the Federal or State Legislature cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of the legislative power; as, to authorize manifest injustice by a positive law; or to take away that security for personal liberty or private property, for the protection whereof government was established."

"A few instances," he adds, "will suffice to explain what I mean: A law that punishes a citizen for an innocent action, or, in other words, for an act which, when done, was in violation of no existing law; a law which destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A and gives it to B. It is against all reason and justice for a people to entrust a legislature with such powers, and, therefore, it cannot be presumed that they have done it. . . . The Legislature . . . cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent private contract; or the right of private property."[1]

It is true carriers are required in transporting passen-

[1] 3 Dallas, 386, 388.

gers to exercise all care that is practicable in the mode of conveyance used by them; but this does not relieve the passenger from exercising ordinary care for his own safety. He is still required to observe such care as is commensurate with the danger which he naturally and voluntarily encounters in traveling, and any law which attempts to relieve him of such care, or to compel another person to respond to him for his failure to use such care for his own safety, is unreasonable, unequal, unconstitutional and void.

Do parties stand equal before the law, or receive its equal protection, when A is required to respond to B for injuries caused by want of care on the part of B? Has the right of property any value, if the property of railroad companies can be taken from them and transferred to a passenger for damages sustained by him solely by reason of his failure to exercise ordinary care—the care that is required of all persons at all times? Certainly not. The purpose and object of all constitutions is to protect individuals and their property from statutes of the character of the one in question, and to insure to all persons the equal protection of the laws.

Is a law equal in its operation which allows a person to profit by his own negligent or wrongful act, and punishes one therefor who has exercised the greatest care and prudence? Does it bear with an impartial hand when it compels A to respond to B for the wrongful or negligent

act of B, or for the failure of the latter to exercise ordinary care for his own safety? Do they stand equal before the law when the innocent is punished and made to respond in damages to the guilty?

If the lawmaking power can compel a railroad company to compensate a passenger for damages received by reason of his failure to exercise ordinary care, it can compel the payment of such damages if the damages were caused by the criminal negligence of the passenger. If the power exists in either of these cases, the Legislature can go farther and compel a carrier to respond to a passenger for damages caused to the latter by his own *intentional* act. There is no difference in principle in these cases, the difference being only in degree.

3. By this statute the railway company is made liable, even though it may have exercised and observed all possible care, caution and foresight in transporting and caring for the passenger and performed every duty and obligation imposed upon it by law. No such liability is imposed upon any other person, company, or corporation, although many other persons, companies and corporations engage in the transportation of passengers, in the operation of railroads, and in other business equally as dangerous; but railroad companies are singled out from all the others and made liable by this statute. The operation of a railroad is as lawful and as beneficial to the public as farming, manufacturing, or dealing in

wares, yet the farmer, the manufacturer and the dealer are protected in their pursuits and permitted to possess and retain their property as long as they exercise proper care and perform their duties according to law, but railroad companies are not. The right of property, under the Constitution of the United States, is just as valid and sacred to railroad companies as to other persons. Why should a railroad company be mulcted in damages when it has been guilty of no wrong and has maintained and operated its road and train with every possible care? Such burdens or liabilities are not and have never been imposed upon other persons, companies, or corporations. On other persons liabilities have never been imposed unless for the failure to perform some duty or obligation, or for some wrong done, and the person at fault is the one that is compelled to respond in damages in such cases; but the statute in question is at war with those cases, and railroad companies, burdened with the liability imposed thereby, do not stand equal with other persons before the law.

The statute does not, expressly or by implication, impose or attempt to impose a duty of any kind or character; it does not prescribe any regulation or precaution as to the operation of railroads or the running of trains, nor does it require that any care or caution or vigilance be used by railroad companies in the transportation of passengers or in the operation of its railroad or trains. It

imposes a liability without the breach of any duty or the violation of any right; and therein lie some of the objections which we urge against its validity.

The Supreme Court of Oregon, in the case of *Sullivan v. Oregon Railway and Navigation Co.*,[1] discusses this question very fully in connection with the statutes of the different States by which liabilities are imposed upon railroad companies, and it shows clearly that when a liability is thus imposed without the violation of a duty the statute has always been declared void and unconstitutional. The court said:

"As the defendant has the lawful right in a lawful way to run its trains, . . . there must be some violation of a duty imposed by law, or some act of negligence on its part. And it would follow, unless the act imposes some duty, the violation of which renders the defendant liable, it would be open to the objection that it subjects the defendant and its business to a liability where no wrong has been committed, or duty unperformed, thereby depriving it of its property and the equal protection of the law afforded to others."

Chief Justice BEASLEY, in speaking for the Supreme Court of New Jersey on this question, said:

"'No man is, in law, an insurer that the acts which he does, such acts being lawful and done with care, shall not injuriously affect others. . . . The common rule, quite institutional in its character, is that, in order to sustain an action for a tort, the damages complained of must have come from a wrongful act. . . . Everywhere, in all the branches of the law, the general principle, that blame must be imputable as a ground of responsibility for damages proceeding from a lawful act,

[1] 19 Or. 319, 321.

is apparent.' A passenger is injured by the breaking of an axle of a public conveyanee; the carrier is not liable, unless negligence can be shown. A man's guest is hurt by the falling of a chandelier; a suit will not lie against the host, without proof that he knew, or ought to have known, of the existence of the danger. If the steam engine which did the mischief in the present case had been in use in driving a train of cars on a railroad, and had, in that situation, exploded, and had inflicted injuries on travelers or bystanders, it could not have been pretended that such damage was actionable, in the absence of the element of negligence or unskillfulness."[1]

Mr. ADDISON very correctly states the rule as follows:

"A man may, however, sustain grievous damages at the hands of another; and yet, if it be the result of a lawful act, done in a lawful manner, without any carelessness or negligence, there is no legal injury, and no tort giving rise to an action for damages."[2]

The Supreme Court of Kansas says:

"Actions are founded only upon wrongs. A cause of action can exist only where some right has been violated. A cause of action founded upon negligence can exist only where the defendant owes some duty to the plaintiff, and wrongfully fails to perform that duty."[3]

The Supreme Court of Minnesota says:

"Actionable negligence is the failure to discharge a legal duty to the person injured. If there is no duty, there is no negligence."[4]

"It is the *fundamental* principle of law," says the Supreme Court of New York, "that the absolute right of every man to use his own property as he pleases for all purposes to which such property is usually applied, provided he exercises proper care and skill to prevent any

[1] Marshall v. Welwood, 38 N. J. L. 339-345.
Ulshowski v. Hill, 61 N. J. L. 375.
[2] Addison on Torts, Vol. 1, p. 3.
[3] A. & N. R. Co. v. Flinn, 24 Kan. 627, 639.
C. C. C. & St. L. R. Co. v. Ballentine, 84 Fed. Rep. 937.
[4] Akers v. Railway Co., 58 Minn. 544.

unnecessary injury to others, is *unlimited and unqualified* up to the point where the particular use becomes a nuisance."[1]

A case directly in point is that of *D. & R. G. R. R. Co. v. Outcalt*,[2] in which a recovery was sought under a statute of Colorado, which provided that railroad companies should be absolutely liable for all stock killed by their trains, without regard to the question of negligence or care on the part of the railroad companies. That statute was similar in principle to the one in question in the case at bar. The court, in holding it unconstitutional and void said:

"It [the statute] declares that the corporation shall be liable and make payment, for damages inflicted by inevitable accident, which no care, skill, diligence or foresight could prevent, and precludes the corporation from exculpating itself or making any defense whatever. In this it is discriminating, special and void. Natural persons are allowed to defend and exonerate themselves, show that the misfortune was inevitable, and the accident and damages unavoidable. Any statute that forecloses a defendant, and precludes all defense and denies the 'day in court' is and must be unconstitutional and void."

In the case of *O. & M. R. Co. v. Lackey*,[3] decided by the Supreme Court of Illinois, was involved a statute which provided that "every railroad company running cars within this State shall be liable for all the expense of the coroner and his inquest, and the burial of all persons who may die on the cars, or who may be killed by

[1] Fisher v. Clark, 41 Barb. 329.
[2] 31 Pac. Rep. 177, 180.
[3] 78 Ill. 55, 56.

collision, or other accident occurring to such cars, or otherwise."

The court, in holding the statute unconstitutional, said:

"On what principle is it that railroad corporations, without any fault on their part, shall be compelled to pay charges which, in other cases, are borne by the property of the deceased, or, in default thereof, by the county in which the accident occurred? An examination of the section will show that no default, or negligence of any kind, need be established against the railroad company, but they are mulcted in heavy damages if, notwithstanding all their care and caution, a death should occur on one of their cars, no matter how caused, even if by the party's own hand. Running of trains by these corporations is lawful, and of great public benefit. It is not claimed that the liability attaches for a violation of any law, the omission of any duty or the want of proper care and skill in running their trains. . . . As argued by the counsel for appellant, the law attempts to place what is properly a public burden upon these corporations, which should be borne by all alike, and discharged out of public funds raised by equal and uniform taxation. . . . The views presented by appellant satisfy us the law in question cannot be sustained as a constitutional enactment."

In the nitro-glycerine cases[1] Mr. Justice FIELD in speaking for this court, said:

"No case or principle can be found, or if found, can be maintained, subjecting an individual to liability for an act done without fault on his part."

And in the case of *Harvey v. Dunlap*,[2] Mr. Chief Justice NELSON used the following language:

"All the cases concede that an injury arising from in-

[1] 15 Wall. 524, 539.

[2] Hill & Denio's Rep. 194.

evitable accident, or which in law and reason is the same thing, from an act which the ordinary care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility."

In the case of *Lozee v. Buchanan*,[1] Mr. Chief Justice SHAW said:

"We think as a result of all the authorities that the rule is that the plaintiff must come prepared with evidence to show that the *intention* was unlawful, or that the defendant was in *fault;* for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be held liable. If, in the prevention of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom."

The Supreme Court of Massachusetts, in the case of *Brown v. Kendall*,[2] used the following language:

"If in the prosecution of a lawful act a casualty purely accidental arises no action can be supported for any injury arising therefrom. . . . To make an accident or casualty, or as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency and in the circumstances in which he was placed."

The principle for which we contend is stated by this court in the case of *Gulf, C. & S. F. R. Co. v. Ellis.*[3] In that case was involved the constitutionality of a statute of Texas which provided that "railroad companies failing to pay claims less than fifty dollars for labor, damages, overcharges on freight or for stock killed, within

[1] 51 N. Y. 489.
[2] 6 Cush. 292, 296.
[3] 165 U. S. 150, 152.

thirty days after presentation thereof, shall be liable for attorney's fees not exceeding ten dollars." This court *held* the statute unconstitutional and void, and, in speaking through Mr. Justice BREWER, said:

"The single question in this case is the constitutionality of the act allowing attorney fees. The contention is that it operates to deprive the railroad companies of property without due process of law, and denies to them the equal protection of the law, in that it singles them out of all citizens and corporations, and requires them to pay in certain cases attorney fees to the parties successfully suing them, while it gives to them no like or corresponding benefit. Only against railroad companies is such exaction made and only in certain cases. . . . The Supreme Court of the State considered the statute as a whole, and held it valid, and as such it is presented to us for consideration. Considered as such, it is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors, and punishes them, when, for like delinquencies, it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts, as other litigants, under like conditions, and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fee of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong. They do not recover any if right; while their adversaries recover if right, and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law."

The Supreme Court of Nebraska has said:

"The rights of every individual must stand or fall by the same *general* law that governs every member of the body politic in the land, under similar circumstances, and therefore a partial law which proposes to affect or destroy the rights of particular persons, or a *particular class* of persons, is not the law of the land."[1]

Defenses which are valid and absolute to other persons and corporations are, by this statute, taken from railroad companies, so that they cannot enter the courts with the same rights and privileges as other litigants. In cases against other persons or corporations the defense of contributory negligence, or that the damages complained of were caused entirely and solely by the negligence of the injured person, is good in every civilized country.

By this statute, as construed by the trial court and Supreme Court of the State, a railroad company is absolutely liable for all injuries received by its passengers while on its trains. It would be liable for injuries caused by lightning, or a missile hurled into a car by a person outside on a public highway.

The language of the Supreme Court of Tennessee is especially applicable at this time:

"Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community who made the law, by another."[2]

[1] A. & N. R. Co. v. Baty, 6 Neb. 37.

[2] Vanzant v. Waddel, 2 Yerg. 260, 270.

It must be remembered that we are not discussing or considering the right of a State to control or regulate railroads or railroad companies. An altogether different question is presented; that is, the power of the State to take the property of one person and transfer it to another. This power is claimed to exist although the person from whom the property is taken has been guilty of no wrong, and has observed in every way his duty to the public as well as to the person to whom the property is given.

"Due process of law" does not mean a law which punishes one for doing that which the sovereign power has legally authorized to de done, or a law which imposes upon A a liability to B for a wrongful act or neglect of B.

In referring to this question, the Supreme Court of Nebraska has said:

"This common law right of property is secured by our constitution. It declares that 'no person shall be deprived of life, liberty or property without due process of law.' The terms 'due process of law' and 'the law of the land'—one or the other of which is found in all constitutions of the States—are said to mean the same thing; and it is quite clear that they are indifferently used in constitutions for the same purpose. They are said to refer to a pre-existing rule of conduct, and designed to exclude arbitrary power from every branch of the government. (*State v. Doherty*, 60 Me. 509. *Norman v. Heist*, 5 W. & S. 171. *The State v. Simon*, 2 Spears, 767.) Hence, these terms do not mean merely a legislative enactment; for 'if they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer than to be taken,

imprisoned, disseized of his freehold, liberties and privileges; be outlawed, exiled and destroyed; *and be deprived of his property*, his liberty and his life, without crime? Yet all this he may suffer if an act of the assembly, simply denouncing these penalties upon particular persons, or a particular class of persons, be in itself the law of the land within the sense of the constitution.' (*Hoke v. Henderson*, 2 Dev. 15.) Webster interprets these terms to mean 'that every citizen shall hold life, liberty, property and immunities under the protection of the *general rules* which govern society. Everything which may pass under the form of an enactment is not therefore to be considered as the law of the land'; and he says, if this were so, 'acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in every possible form would be the law of the land. There would be no general permanent law for the courts to administer, or even to live under. The administration of justice would be an empty form—an idle ceremony. Judges would sit to execute legislative judgments and decrees, and not to declare the law, or administer the justice of the country.'"[1]

The Legislature of Utah passed an act making railroad companies liable for the death of all live stock killed by its cars. In holding the statute unconstitutional and void as not due process of law, the Supreme Court said:

"But it yet remains for us to define 'due process of law,' as understood in the common law of England, and by inheritance the common law of America. Many definitions have been attempted, but it is believed that they all come to this citation, which means that a party shall have his day in court—trial, which means the right of each party, plaintiff and defendant, to introduce evidence to establish his right to recover on the one hand, and to establish his defense upon the part of the other, after

[1] A. & N. R. Co. v. Baty, 6 Neb. 37, 42.

which comes judgment. Any judgment which is rendered without these modes of procedure, or in disregard of them, is not 'due process of law.' Any other procedure condemns before it hears, does not proceed upon inquiry, but renders judgment before trial. Tested by the light of these suggestions, how stands it with the statute in this case? The defendant company, under a charter granted by the Legislature, of which the statute mentioned is no part, has purchased its right-of-way over the lands of the territory, established its track, and put thereon its engines and cars, for the purpose of carrying out the original design of the Legislature in granting its charter. It will then be seen that the defendant is in the exercise of a lawful right, in a lawful way. Now, comes the statute and says to the defendant: 'Notwithstanding all this, when you kill an animal you shall pay its value to the owner.' That is, although you are in the exercise of a perfectly lawful pursuit, and without any fault or negligence, proof of killing and value shall be conclusive evidence of wrong upon your part, and you shall not be allowed to aver or prove the contrary. If this be due process of law, then all the Legislature has to do, to take the property of A and give it to B, is to enact that when A sues B certain admitted facts shall establish conclusively A's right to recover, and B shall not be heard to introduce evidence to the contrary. No matter how careful and cautious an engineer may be in the management of his train; no matter how steep the grade may be that his train is going down; no matter how many hundred lives are in his care behind his engine—yet all must be sacrificed to save a horse or cow, or the company is to pay the damages. Hardly."[1]

Similar statutes were passed by the Legislatures of Colorado, Idaho, Montana and Washington,[2] but they have *all* been held by the Supreme Courts as not due process of law and void.

[1] Jensen v. R. Co, 6 Utah, 253.

[2] Cattrell v. R. Co., 2 Idaho, 540; Bielenberg v. R. Co., 8 Mont. 271; R. Co. v. Outcalt, 31 Pac. Rep. 177; Oregon Ry. & Nav. Co. v. Smally, 1 Wash. St. 206.

In *Zeigler v. R. Co.*,[1] a statute was under consideration which provided that railroad corporations should be liable for the value of all live stock killed by their trains, without reference to the skill or diligence with which the train was operated. The Supreme Court of Alabama said:

"This statute declares that railroad corporations shall be liable, and make compensation to the owner, for all damages to live stock caused by their locomotives or trains, without any reference to the skill or diligence with which the train is operated. It results that no matter what care, prudence, watchfulness and skilled knowledge those having charge of a train may employ, still, if damage to live stock be caused by the train, the railroad corporation is responsible, unless the person owning such live stock contribute to the injury; but permitting live stock to run at large shall not be considered as contributing to such injury. (Section 3 of the act.) It is obvious that under this statute the highest diligence could not avoid frequent injuries to live stock, for which the corporation would be held accountable, if the act be constitutional. Two facts, and two only, are required to be shown to authorize a recovery: Ownership of the property, and injury by the locomotive or cars of the railroad. The graver inquiry of capacity and diligence in the conduct of the train, the law assumes to determine or dispense with. Is this 'due process of law,' under section 7 of the declaration of rights? . . .

"The clause itself means that such legislative acts, as profess in themselves directly to punish persons, or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it rested, according to the course, mode and usages of the common law as derived from our forefathers, are not effectually 'laws of the land,' for those purposes.

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[1] Zeigler v. R. Co., 58 Ala. 594, 596.

"'Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. . . . They were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' (Cooley Cons. Lim. 355.)

. . . . . .

"We have said above that the statute under discussion dispenses with all proof of the most material element of the wrong it seeks to redress. It declares that the railroad corporation shall make reparation for any injury inflicted in the authorized prosecution of its lawful business, without a semblance of fault, negligence, or want of skill in its employes; an injury, which no human prudence or foresight could prevent; and yet, the statute will not allow the railroad to exculpate itself, by proof of the highest qualifications and most watchful vigilance. This falls short of due process of law. We have heretofore declared a rule which exacts from railroad corporations a high degree of skill and diligence, to prevent injury to persons and property. (See *Tanner v. Louisville & Nashville R. R. Co.; Sav. & Memp. R. R. Co. v. Shearer*, and *S. & N. R. R. Co. v. Sullivan*, at the present term.) We have no wish to modify that rule. But when these very useful corporations conform to this strict rule of diligence, we can perceive no reason, in law or morals, for holding them to a stricter measure of accountability for inevitable misfortunes, than would be exacted from natural persons for injuries which result from unavoidable accident; or accidents which no human prudence can foresee or avert."

How could a proposition be clearer than the one just quoted? Under the statute in question railroad companies are not allowed a trial, or an examination of the facts or law on the question of liability. The liability is made absolute and conclusive as to all passengers who

are injured while being transported over the road, except those who are injured by their own *criminal* negligence, or by their violation of an express rule or regulation actually brought to their notice. All other questions relating to the liability or the right to recover are absolutely adjudged and finally determined against railroad companies. If the Legislature has the power to deprive a railroad company of the right to defeat such an action by showing that it was not negligent, or that the injury to the passenger was sustained by his own wrongful act, or by his failure to exercise ordinary care, the same power would enable it to say that the defendant could not defeat the action by showing that the injury was caused by the *criminal* negligence of the passenger, or by his violation of an express rule or regulation actually brought to his notice or by his intentional act. The extent to which the power is exercised does not determine the question of right or the validity of the act.

As was said by Mr. Justice BRADLEY, in *Boyd v. U. S.*:[1]

"Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it

[1] 116 U. S. 616, 635; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150.

consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

It must be remembered that the statutes of Idaho, Montana, Utah, Washington, Colorado and Illinois, all of which have been held unconstitutional, as stated above, were not as vicious as the statute of 1867, in question in this case. Neither of the first mentioned statutes deprive the defendant of the defense of contributory negligence, as the latter one does to a very great extent.

Especially applicable at this time is the following language of this court:[1]

"The law applicable to common carriers is one of great vigor. Though to the extent to which it has been carried, and in the cases to which it has been applied we admit its necessity and its policy, we do not think it ought to be carried further, or applied to new cases. We think it has not been applied to living men, and that it ought not to be applied to them."

It may be contended that the same reason exists for making railroad companies absolutely liable for damages to passengers as exists for holding them liable for the loss of goods or freight. This contention may seem plausible at first, but when considered in the light of the reasons for imposing the liability for inanimate objects, its unsoundness as applied to passengers is apparent.

[1] Boyce v. Anderson, 2 Pet. 154, 155.

The rule with reference to inanimate objects was first stated and the carrier held liable as an insurer of freight delivered to it for transportation, by Lord HOLT, in the case of *Coggs v. Bernard*, in 1703. In stating the rule, he said:

"As to the fifth sort of bailment, viz., a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts: either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier. . . . The law charges this person thus intrusted to carry goods, against all events but acts of God, and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point."[1]

The next case in which the reason for the rule was stated was that of *Riley et al. v. Horne*,[2] decided in 1828, by the Court of Common Pleas. In that case BEST, C. J., in speaking for the court, said:

"When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to the place of

[1] 2 Ld. Raym. 917, 918.

[2] 5 Bing. 220.

their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes or loss; his witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves."

All subsequent cases in which this liability has been imposed have been based on these two cases, and no reason for imposing it, other than those quoted above, has ever been given. It is, therefore, clear that the reason for imposing this liability was, that as the goods or freight was delivered into the possession of the carrier and was no longer under the eye of the owner, and that the only person who could know of the manner in which the goods were damaged or destroyed would be the servants of the carrier, and they, "knowing that they could not be contradicted, would" perjure themselves and testify falsely in order to protect their master—the carrier. This court would not hesitate to declare unconstitutional a statute imposing or creating a liability having for its support the reasons stated in the cases just quoted from.

This liability has never been extended to passengers, and were it not so well fixed, it would, in this age of advanced civilization and enlightenment, be denied to goods and other inanimate objects. This is clear from the following language, used in 1869 by the same court that established the rule imposing the liability in 1703:

"The law of England has, from the earliest times, established a broad distinction between the liabilities of common carriers of goods and of passengers. Indeed, the responsibility of the carrier to redeliver the goods in a sound state can attach only in the case of goods. This responsibility (like the analogous one of innkeepers) has been so long fixed, and is so universally known, that carriers of goods undertake to carry on contracts well understood to comprehend this implied liability. If it had not been the custom of the realm or the common law declared long ago that carriers of goods should be so liable, it would not have been competent for the judges in the present day to have imported such a liability into their contracts on reasons of supposed convenience. But this is, as it seems to us, what we are asked by the plaintiffs to do in the case of carriers of passengers."[1]

But, as we have already stated, the relation of a carrier to a carload of freight and to a passenger is altogether different, and the transportation of the two is not and cannot be similar in any way, hence the liability must necessarily be different.

Passengers must be allowed some freedom — they cannot be stored away or taken possession of like freight or inanimate objects.

"Consequently," says Mr. Hutchinson, "the policy of the law, as it is called, which induced the judges in early times to establish the rule of the extraordinary responsibility of common carriers as to the goods entrusted to them, . . . was never applicable to carriers of passengers."[2]

In speaking for this court on this question Chief Justice MARSHALL said:[3]

[1] Readhead v. The Midland Railway Company, 4 L. R. Q. B. 380.

[2] Hutchinson on Carriers, sec. 497.

[3] Boyce v. Anderson, 2 Pet. 150, 154.

"There being no special contract between the parties in this case, the principal question arises on the opinion expressed by the court, 'that the doctrine of common carriers does not apply to the case of carrying intelligent beings, such as negroes.'

"That doctrine is, that the carrier is responsible for every loss which is not produced by inevitable accident. It has been pressed beyond the general principles which govern the law of bailment by considerations of policy. Can a sound distinction be taken between a human being in whose person another has an interest, and inanimate property?

"A slave has volition, and has feelings which cannot be entirely disregarded. These properties cannot be overlooked in conveying him from place to place. He cannot be stowed away as a common package. Not only does humanity forbid this proceeding, but it might endanger his life or health. Consequently, this rigorous mode of proceeding cannot safely be adopted, unless stipulated for by special contract. Being left at liberty, he may escape. The carrier has not and cannot have the same absolute control over him that he has over inanimate matter. In the nature of things, and in his character, he resembles a passenger, not a package of goods. It would seem reasonable, therefore, that the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than by that which is applicable to the carriage of common goods.

"There are no slaves in England, but there are persons in whose service another has a temporary interest. We believe that the responsibility of a carrier for injury which such person may sustain has never been placed on the same principle with his responsibility for a bale of goods. He is undoubtedly answerable for any injury sustained in consequence of his negligence or want of skill; but we have never understood that he is responsible further."

But carriers have never been held liable for damages to freight that were caused by the act, whether negligent or otherwise, of the shipper. In order to place upon the

carrier the common law liability, the carrier must have the unlimited control of the property, which cannot be obtained in the transportation of passengers, as they are endowed with intelligence and must necessarily be allowed some freedom during transportation.

The reason why the liability in both cases is not the same is stated very clearly by Mr. Hutchinson, as follows:

"Public carriers may not only be carriers of goods, but carriers of persons also, and while carrying the goods, may at the same time carry their owners. As to the one, in such a case, the carrier would be a passenger carrier, and as to the other, a common carrier of goods; and although he might carry them both upon the same conveyance, and at the same time, the nature of the responsibility which he would incur as to them would be very different; and this difference in the kind of responsibility which the law imposes upon him exists even between the passenger and his baggage, as to which, as we have seen, the carrier becomes responsible as a common carrier of goods, although its carriage is merely incidental to the carriage of the passenger. Of the goods he must have, in order to impose upon him the responsibility of a common carrier, *the absolute and unlimited control*, and the law supposes that their safety, aside from the acts of God and the public enemy, against which it protects him, depends entirely upon the care and faithfulness with which he discharges his trust. But the passenger being endowed with intelligence and the power of locomotion, which enable him, in a great measure, to foresee and avoid danger, the exercise of at least ordinary prudence is required on his part to escape it, and if, by his failure to exercise these faculties for his own preservation, a misfortune befall him, though the carrier may have been in fault, it will be attributed to his own carelessness and inattention,

and the responsibility will not be thrown upon the carrier."[1]

The liability of an individual carrier as an insurer of dead freight is the same as that of corporate carriers. There is no good reason why the liability for injuries to passengers should be different in the case of an individual from that of a railway carrier.

In the case of *Hart v. C. & N. W. R. Co.*,[2] the defendant contended that it was not responsible for the loss of the freight if it was caused by the act of the owner, or by his failure to exercise ordinary care. The court, in upholding this contention, and in deciding that the carrier was not responsible for any damages caused by the act of the owner, used the following language:

"The question presented by this assignment of error, then, is, whether a common carrier is responsible for the injury or destruction of property while it is in the course of transportation, when the injury is caused by some act of the owner, but which is unattended with any negligence on the part of the owner.

"The carrier is held to be an insurer of the safety of the property while he has it in his possession as a carrier. His undertaking for the care and safety of the property arises by the implication of law out of the contract for its carriage. The rule which holds him to be an insurer of the property is founded upon considerations of public policy. The reason of the rule is that, as the carrier ordinarily has the absolute possession and control of the property, while it is in course of shipment, he has the most tempting opportunities for embezzlement or for fraudulent collusion with others. Therefore, if it is lost or destroyed while in his custody, the policy of the law imposes the loss upon him. (*Coggs v. Bernard*, 2 Ld.

[1] Hutchinson on Carriers, sec. 495, p. 398.

[2] 69 Iowa, 485, 487.

Raym. 909; *Forward v. Pittard*, 1 Durn. & E. 27; *Riley v. Horne*, 5 Bing. 217; *Thomas v. Railway Co.*, 10 Metc. 472; *Roberts v. Turner*, 12 Johns. 232; *Moses v. Railway Co.*, 24 N. H. 71; *Rixford v. Smith*, 52 id. 355.) His undertaking for the safety of the property, however, is not absolute. He has never been held to be an insurer against injuries occasioned by the act of God, or the public enemy; and there is no reason why he should be; and it is equally clear, we think, that there is no consideration of policy which demands that he should be held to account to the owner for an injury which is occasioned by the owner's own act; and whether the act of the owner by which the injury was caused amounted to negligence is immaterial also. If the immediate cause of the loss was the act of the owner, as between the parties, absolute justice demands that the loss should fall upon him, rather than upon the one who has been guilty of no wrong; and it can make no difference that the act cannot be said to be either wrongful or negligent. If, then, the fire which occasioned the loss in question was ignited by the lantern which plaintiff's servant, by his direction, took into the car, and which, at that time, was in the exclusive control and care of the servant, defendant is not liable, and the question whether the servant handled it carefully or otherwise is not material. This view is abundantly sustained by the authorities. (See Hutch. Carr., § 216, and cases cited in the note; also Lawson Carr., §§ 19, 23.)"

It may also be contended that the act of 1867 should be upheld on the same ground that statutes making railway companies liable for damages caused by fire set out by their engines are held valid, but the reasons and grounds upon which the statutes are founded, are entirely different.

In pointing out this difference, the Supreme Court of Colorado said:

"The statute making every railroad company unconditionally liable in case it shall kill or damage a domestic animal by running its trains over or against such animal stands on a footing quite different from the fire statute. Fire is a dangerous element, and according to the ancient common law the rule was, as stated in the De Busk case, that 'a person who makes a fire must see that it does no harm, and must answer for the damage, if it does any.'"[1]

The Supreme Court of Missouri, in the Mathews[2] case, said:

"It ought not to excite surprise among a people, the great body of whose laws had their origin in England, that those who set out fires which destroy the property of others should be held absolutely responsible for them. Such was the ancient common law before any statutes were enacted. 'If my fire, by misfortune burns the goods of another man, he shall have his action on the case against me. If a fire breaks out suddenly in my house, I not knowing it, and it burns my goods and also my neighbor's house, he shall have his action on the case against me. So if the fire is caused by a servant, or a guest, or any person who entered the house with my consent; but otherwise if it is caused by a stranger who entered the house against my will.' Rolle's Abridgment, Action on the Case, 'B'; *tit.*, 'Fire.'"

"At common law," says the Supreme Court of the United States in the Mathews case, "every man appears to have been obliged, by the custom of the realm, to keep his fire safe so that it should not injure his neighbor; and to have been liable to an action if a fire, lighted in his own house, or upon his land, by the act of himself, or of his servants or guests, burned the house or property of his neighbor, unless its spreading to his neighbor's property was caused by a violent tempest, or

[1] Wadsworth v. U. P. Ry. Co., 18 Colo., 600, 610.

[2] 121 Mo., 298, 317.

other inevitable accident which he could not have foreseen."[1]

The Supreme Court of Arkansas, in referring to this same question, said:

"In Massachusetts, by statute, railroad companies are made absolutely liable for injuries by fire communicated from their engines; but in compensation are given an insurable interest in any buildings along the route. The courts have sustained this law, but the nature of it is peculiar and exceptional, and the language too clear to admit of doubt."[2]

Again: In the fire cases, the fire is set out and the damage is caused by the direct act of the company, in throwing, or permitting the fire to escape, from the locomotive; but in the case at bar the death of Zernecke was caused, not by any act of the plaintiff in error, but by the malicious and felonious act of a third party.

Suppose Davis, instead of derailing the train, had set fire on the right-of-way of the company without its consent or knowledge; and that such fire had escaped, without fault on the part of the company, to an adjoining field, causing damage to the owner thereof: could the company have been held for such damage? Clearly not. Or, to state a case more like the one at bar, suppose a man, for the purpose of committing murder or robbery, should set fire to a building of another, causing it to be consumed, and that the fire so started, without the fault of the owner of the building, should be commu-

[1] St. Louis & San Francisco Ry. Co. v. Mathews, 165 U. S. 5.

[2] Little Rock & Ft. Scott Ry. Co. v. Payne, 33 Ark. 816, 820.

nicated to and destroy another building: would any statute, which made the owner of the building first feloniously set on fire liable for damages to the other building, be valid?

We respectfully submit that the statute in question is unconstitutional and that the judgment of the Supreme Court of the State of Nebraska should be reversed.

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